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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
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11 DEANNA ROBBINS,

12 Plaintiff,

13 v.

14 MERIT SYSTEMS PROTECTION
15 BOARD,

16 Defendant.
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No. 2:21-CV-0621-KJM-DMC

FINDINGS AND RECOMMENDATIONS

18 Plaintiff, who is proceeding pro se, brings this civil action seeking judicial review
19 of a final decision of the United States Equal Employment Opportunity Commission (EEOC).
20 Pending before the Court is Defendant's motion to dismiss this action pursuant to Federal Rule of
21 Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction, ECF No. 21. Plaintiff has not
22 filed an opposition. For the reasons discussed below, the Court finds that Defendant's motion to
23 dismiss should be granted and that this action should be transferred to the United States Court of
24 Appeals for the Federal Circuit.

25 A motion under Rule 12(b)(1) challenges a federal court's jurisdiction to decide
26 claims alleged in the complaint. See Fed. R. Civ. P. 12(b)(1). The motion may be a factual attack
27 that looks beyond the pleadings to challenge "the substance of a complaint's jurisdictional
28 allegations despite their formal sufficiency." White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000);

1 St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir. 1989). When considering a factual attack
 2 on subject-matter jurisdiction, “[n]o presumptive truthfulness attaches to plaintiff’s allegations,
 3 and the existence of disputed material facts will not preclude the trial court from evaluating for
 4 itself the merits of jurisdictional claims.” Thornhill Pub. Co. Inc. v. Gen. Tel. & Elecs. Corp., 594
 5 F.2d 730, 733 (9th Cir. 1979). “[T]he district court may review evidence beyond the complaint
 6 without converting the motion to dismiss into a motion for summary judgment.” Safe Air for
 7 Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004).

8 9 I. BACKGROUND

10 In her complaint, Plaintiff names in the caption “Merit Systems Protection Board
 11 Director Position Vacant.” ECF No. 1, pg. 1. In section I.B., Plaintiff names William D. Spencer
 12 as the “Clerk of the Board.” Id. at 2. Plaintiff alleges that the basis of this Court’s federal
 13 question jurisdiction is to “Appeal Agency decision.” Id. at 4. According to Plaintiff, Merit
 14 Systems Protection Board (MSPB) improperly dismissed her administrative appeal as untimely.
 15 See id. at 6.

16 Attached to Plaintiff’s complaint is a March 18, 2021, “Denial of Consideration”
 17 letter sent by the United States Equal Employment Opportunity Commission (EEOC) in Petition
 18 No. 2021001570. See id. at 13-14. By way of this letter, the EEOC denied as untimely Plaintiff’s
 19 appeal of a decision by Defendant Merits Systems Protection Board. See id. The letter expressly
 20 advised that it represented the final decision of the Commissioner of the EEOC, and that Plaintiff
 21 had a right to judicial review. See id. The letter also instructed that any such action “must name
 22 the person who is the official Agency head or department head, identifying that person by his or
 23 her full name and official title.” Id. at 14.

24 As indicated above, the Court may consider evidence beyond the complaint when
 25 evaluating a motion to dismiss for lack of jurisdiction. The Court does so here and accepts
 26 Defendant’s unopposed statement of the procedural history, which is supported by the declaration
 27 of defense counsel and Exhibits A, B, and C attached thereto. See ECF No. 21-1, 21-2.

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II. DISCUSSION

In its motion to dismiss, Defendant argues that the Court lacks subject matter jurisdiction because the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction. See ECF No. 21-1. The Court agrees and further finds that this action should be transferred to the Federal Circuit for adjudication of Plaintiff’s petition for judicial review.

As Defendants’ evidence shows, this matter concerns benefits under the Federal Employees’ Retirement System (FERS). According to Defendant:

The Federal Employees’ Retirement System (“FERS”), 5 U.S.C. §§ 8401-8479, provides that the OPM shall administer disability retirement and otherwise “shall adjudicate all claims” regarding retirement benefits under this chapter. *See* 5 U.S.C. § 8461(c); *Anthony v. OPM*, 58 F.3d 620, 626 (Fed. Cir. 1995). After OPM renders a final decision, FERS provides for review of OPM’s decision by the MSPB. *See* 5 U.S.C. § 8461(e)(1). An employee dissatisfied with a decision from the MSPB may then petition for judicial review in the United States Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1); *Rodriguez v. United States*, 852 F.3d 67, 83 (1st Cir. 2017) (explaining that the “exclusive remedial framework” provided by the Civil Service Reform Act provides that a plaintiff must pursue retirement claims through the statutory structure – which requires a decision by OPM, followed by an appeal to the MSPB, and finally judicial review in the Federal Circuit).

ECF No. 21-1, pgs. 3-4.

The Federal Circuit’s authority to review decisions from the MSPB involving benefits under FERS is exclusive. See *Eisenbeiser v. Chertoff*, 448 F. Supp. 2d 106, 109 (D.D.C. 2006); *Sherman v. United States*, 139 Fed. Cl. 640, 650 (2018); *Hannon v. United States*, 48 Fed. Cl. 15, 23 (2000); *Matsuo v. United States*, 416 F. Supp. 2d 982, 998 (D. Haw. 2006); *Escoc v. Off. Of Pers. Mgt.*, 2019 WL 8112900, at *2 (C.D. Cal. 2019); *Phelps v. United States*, 2018 WL 684803, at *2-3 (E.D. Cal. 2018).

In some instances, the district court and not the Federal Circuit would have exclusive jurisdiction. See *Ash v. Off. Of Pers. Mgt.*, 25 F.4th 1009 (Fed. Cir. 2022 (per curiam)). In *Ash*, the Federal Circuit held that an OPM decision that adversely affects retirement rights or benefits may be a “personnel action” giving rise to a mixed case over which the district court has exclusive jurisdiction. See id. A “mixed case” is one in which the employee has been affected by a personnel action that is subject to review by the MSPB and in which the employee alleges that

the action was prompted in whole or in part by discrimination. See 5 U.S.C. § 7703(b)(1)(A); see also Kloeckner v. Solis, 568 U.S. 41, 44 (2012).

The Court agrees with Defendant that this is not a “mixed case.” As Defendant notes, even if this action can be characterized as a personnel action, Plaintiff has not alleged – either in this Court or before the MSPB – that OPM’s decision was prompted in any part by discrimination against Plaintiff.

The Court finds that this matter should be transferred pursuant to 28 U.S.C. § 1631 to the United States Court of Appeals for the Federal Circuit.

III. CONCLUSION

Based on the foregoing, the undersigned recommends that Defendant’s unopposed motion to dismiss, ECF No. 21, be GRANTED and that this matter be transferred to the United States Court of Appeals for the Federal Circuit.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 14 days after being served with these findings and recommendations, any party may file written objections with the Court. Responses to objections shall be filed within 14 days after service of objections. Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: July 25, 2023



DENNIS M. COTA
UNITED STATES MAGISTRATE JUDGE